

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN D. DILTZ,

Petitioner,

v.

JERI BOE,

Respondent.

CASE NO. C18-0981-JCC

ORDER

This matter comes before the Court on Petitioner's objections (Dkt. No. 29) to Magistrate Judge James P. Donohue's report and recommendation ("R&R") (Dkt. No. 23). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby **OVERRULES** Petitioner's objections, **ADOPTS** Judge Donohue's R&R, and **DENIES** Petitioner's habeas petition for the reasons explained herein.

I. BACKGROUND

The facts summarized by the Washington Court of Appeals and reiterated by Judge Donohue are as follows. On April 29, 2013, Officer Jeffrey Norris pulled over a black pickup truck, driven by Petitioner, on the on-ramp to southbound Interstate 5 ("I-5"). (Dkt. No. 23 at 2.) As Officer Norris approached the truck, Petitioner began driving southbound on I-5. (*Id.*) Officer Norris returned to his patrol car and began following Petitioner. (*Id.*) After engaging in a high-speed chase on State Route 529, Petitioner exited in Everett; his truck's driveline fell off, and he

1 crashed into a parked car. (*Id.*) Petitioner began running through a neighborhood, with Officer
2 Norris in pursuit on foot. (*Id.*) Petitioner fired a gun at Officer Norris, and then jumped over a
3 fence. (*Id.*) Officer Norris was not hit by the bullets, and he called for backup. (*Id.*) Other police
4 arrived and eventually arrested Petitioner. (*Id.*) Upon an initial search of the area, police found
5 Petitioner's jacket, gloves, phone, and four shell casings, but no firearm. (*Id.*) On May 17, 2013,
6 Petitioner was charged in Snohomish County Superior Court with aggravated first degree assault
7 against a police officer while armed with a firearm, and attempting to elude police while
8 threatening others with physical injury or harm. (*Id.* at 3.)

9 After listening to recorded calls made by Petitioner from jail, Detective Steve Brenneman
10 returned to the scene and found a Ruger P89 pistol buried under mulch in the backyard where
11 Petitioner's jacket was found. (*Id.*) Forensic testing revealed that the shell casings recovered at
12 the scene had been fired from the recovered gun. (*Id.*) On July 26, 2013, Petitioner was
13 additionally charged with possession of a stolen firearm, possession of a stolen vehicle, and
14 unlawful possession of a firearm in the second degree. (*Id.*)

15 The jury found Petitioner not guilty of possession of a stolen firearm, and found
16 him guilty of first degree assault, attempting to elude a pursuing police vehicle,
17 possession of a stolen vehicle, and second degree unlawful possession of a firearm. (*Id.*)
18 The jury returned special verdicts finding that Petitioner committed first degree assault
19 against a law enforcement officer while armed with a firearm and threatened individuals
20 other than Petitioner and Officer Norris with physical injury or harm. (*Id.*)

21 Upon appeal, the Washington Court of Appeals affirmed the conviction, and the
22 Supreme Court denied review. (*Id.* at 4.) Petitioner filed a personal restraint petition,
23 which was denied by both state appellate courts. (*Id.*) Petitioner now brings a habeas
24 petition alleging (1) prosecutorial misconduct, (2) ineffective assistance of trial counsel,
25 (3) ineffective assistance of appellate counsel, and (4) cumulative error. (*See* Dkt. No. 5
26 at 3–10.) Judge Donohue's R&R recommends denying Petitioner's habeas petition

1 without an evidentiary hearing and dismissing this action with prejudice. (Dkt. No. 23 at
2 22.) Petitioner has filed objections to the R&R. (Dkt. No. 29.)

3 **II. DISCUSSION**

4 **A. Standards of Review**

5 The Court reviews objections to a magistrate judge’s report and recommendation *de*
6 *novo*. 28 U.S.C. § 636(b)(1). The Court “may accept, reject, or modify, in whole or in part, the
7 findings or recommendations made by the magistrate judge.” *Id.*

8 The Court shall not grant a habeas petition filed by a person in custody pursuant to a state
9 court judgment, “unless the adjudication of the claim—(1) resulted in a decision . . . contrary to .
10 . . . clearly established Federal law . . . or (2) resulted in a decision that was based on an
11 unreasonable determination of the facts.” 28 U.S.C. § 2254(d). The Court may overturn a state
12 court’s decision only if its application of the law to the facts was “objectively unreasonable.”
13 *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *see also Hibbler v. Benedetti*, 693 F.3d 1140, 1146
14 (9th Cir. 2012). The Court presumes that the state court’s factual findings are proper unless the
15 Petitioner “rebutts the ‘presumption of correctness by clear and convincing evidence.’” *See*
16 *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)).

17 **B. Overlength Objections**

18 Respondent moves to strike Petitioner’s objections as overlong. (Dkt. No. 30); W.D.
19 Wash. Local Civ. R. 72. Whether to strike all or part of an overlength pleading is within the
20 Court’s discretion. *See Swanson v. U.S. Forest Service*, 87 F.3d 339, 345 (9th Cir. 1996).
21 Respondent’s request to strike Petitioner’s overlength objections (Dkt. No. 30) is DENIED.
22 Petitioner’s motion for leave to file overlength objections (Dkt. No. 31) is DENIED as moot.

23 **C. Prosecutorial Misconduct**

24 To succeed on a claim of prosecutorial misconduct, a petitioner must show that the
25 prosecutor’s alleged inappropriate comments or actions “so infected the trial with unfairness as
26 to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168,

1 181 (1986). Habeas relief shall be granted only if prosecutorial misconduct “had substantial and
2 injurious effect or influence in determining the jury’s verdict.” *See Wood v. Ryan*, 693 F.3d
3 1104, 1113 (9th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The
4 Court must evaluate alleged acts of misconduct in the context of the entire case. *See Greer v.*
5 *Miller*, 483 U.S. 756, 765-66 (1987); (*see* Dkt. No. 23 at 6–18.)

6 Petitioner claims that Judge Donohue “erroneously [and] unreasonably” held that the
7 prosecutor did not lead Officer Norris when he asked him during direct examination, “What did
8 you think at the time that you saw [Petitioner] pointing back at you?” (Dkt No. 29 at 1–3.)
9 Petitioner posits that Judge Donohue “ignore[s] and/or fail[s] to acknowledge” that Officer
10 Norris conceded that he did not remember Petitioner pointing a gun at him and that the
11 prosecutor asked him leading questions. (*Id.* at 3–4.) Judge Donohue appropriately determined
12 that the prosecutor’s questions were not leading because “[b]ased on the colloquy between the
13 prosecutor and Officer Norris, it would be reasonable to conclude that Officer Norris pointed
14 during his demonstration.” (Dkt. No. 23 at 9.) Thus, Petitioner’s objection is unavailing.

15 Judge Donohue agreed with the state court’s conclusion that the prosecutor did not
16 prejudicially portray witness Teresa Myer as a liar. (Dkt. No. 23 at 9–12.) Petitioner objects by
17 reiterating his original argument—that the prosecutor misrepresented Myer as a liar, which
18 substantially influenced the jury. (*See* Dkt. No. 29 at 7–10.) Judge Donohue properly addressed
19 this argument by noting that the prosecutor did not use the word “lie,” and used the word
20 “embellish” once in reference to Myer in a way that would not have substantially influenced the
21 jury. (*See* Dkt. No. 23 at 9–12.) Judge Donohue also noted that the inconsistencies between
22 Myer’s 911 call and other testimony support the prosecutor’s claim that Myer may have
23 misremembered certain details. (*Id.* at 12.) Thus, Petitioner’s objection is unavailing.

24 Petitioner argues that he was prejudiced because the prosecutor misstated the evidence—
25 *i.e.*, claiming that an additional 10-round clip was found in the truck—and made inflammatory
26 and extraneous statements during the trial regarding Petitioner’s intent to harm Officer Norris.

1 (See Dkt. No. 29 at 10–13.) Petitioner objects to Judge Donohue’s conclusion that “there was
2 ample other evidence in the record of [P]etitioner’s intent to inflict great bodily injury.” (See *id.*
3 at 13) (quoting Dkt. No. 23 at 15.) Petitioner does not introduce any evidence to counter Judge
4 Donohue’s conclusion. (See *id.*) Based on the record, Judge Donohue correctly determined that
5 the prosecutor’s actions and statements “did not have a ‘substantial and injurious effect’” on the
6 jury verdict, in light of the facts showing Petitioner’s intent to inflict great bodily injury. (Dkt.
7 No. 23 at 14–15, 17.)

8 In sum, Petitioner has not met the standard of rebuttal and his objections to the R&R’s
9 conclusions as to his claims of prosecutorial misconduct are OVERRULED. 28 U.S.C.
10 § 2254(e)(1).

11 **D. Ineffective Assistance of Counsel**

12 Judge Donohue determined that the Washington Court of Appeals reasonably applied the
13 *Strickland* standard to deny Petitioner’s ineffective assistance of counsel claims. (See Dkt. No.
14 23 at 18–20); *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Strickland v. Washington*,
15 466 U.S. 668 (1984)). Petitioner did not prove that trial counsel’s failure to object to or request
16 instruction for alleged prosecutorial misconduct rendered counsel’s performance deficient to a
17 prejudicial degree. (Dkt. No. 23 at 19); *Strickland*, 466 U.S. at 687. Appellate counsel’s choice to
18 omit Petitioner’s prosecutorial misconduct claims for lack of merit was not ineffective
19 assistance. (Dkt. No. 23 at 20); see *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Miller v.*
20 *Keeney*, 882 F.2d 1428, 1428 (9th Cir. 1989). Petitioner objects to these conclusions, but does
21 not provide a basis for his objections. (Dkt. No. 29 at 13–14.) Petitioner has not met the standard
22 of rebuttal and his objections to the R&R’s conclusions as to his claims of ineffective assistance
23 of counsel are OVERRULED. 28 U.S.C. § 2254(e)(1).

24 **E. Cumulative Error**

25 Judge Donohue recommends denying Petitioner’s claim of cumulative error. (Dkt. No. 23
26 at 20–21.) Petitioner objects “in light of ‘all’ of the foregoing.” (Dkt. No. 29 at 15.) Judge

1 Donohue correctly found that nothing in Petitioner’s trial “accumulate[d] to a level of a
2 constitutional violation” because Petitioner only established one non-prejudicial error—the
3 prosecutor’s misstatement of evidence. (Dkt. No. 23 at 14, 21) (quoting *Mancuso v. Olivarez*,
4 292 F.3d 939, 957 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*, 529 U.S.
5 473 (2000)). Petitioner has not met the standard of rebuttal and his objections to the R&R’s
6 conclusions as to his claims of cumulative error are OVERRULED. 28 U.S.C. § 2254(e)(1).

7 **F. Evidentiary Hearing**

8 Judge Donohue concluded that an evidentiary hearing is unnecessary because the
9 disputes “can be resolved by reference to the state court record.” (Dkt. No. 23 at 21.) Petitioner
10 objects “in light of ‘all’ the foregoing” and incorporating by reference his traverse/reply to
11 Respondent’s answer and memorandum of authorities (Dkt. No. 19). (Dkt. No. 29 at 15.)
12 Petitioner has not met the standard of rebuttal and his objections to the R&R’s conclusions as to
13 his request for an evidentiary hearing are OVERRULED. 28 U.S.C. § 2254(e)(1).

14 **III. CONCLUSION**

15 For the foregoing reasons, the Court OVERRULES Petitioner’s objections (Dkt. No. 29),
16 ADOPTS Judge Donohue’s R&R (Dkt. No. 23), and DISMISSES Petitioner’s habeas petition.
17 This action is DISMISSED with prejudice. An evidentiary hearing and certificate of
18 appealability are DENIED as to all the claims raised in this action.

19 DATED this 25th day of June 2019.

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23 John C. Coughenour
24 UNITED STATES DISTRICT JUDGE
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